EDWARD GRADY

IBLA 75-41 Decided December 4, 1974

Appeal from the Missoula, Montana, District Office, Bureau of Land Management, rejecting application for Section 15 grazing lease.

Affirmed.

1. Grazing Leases: Apportionment of Land -- Grazing Leases: Preference Right Applicants -- Grazing Leases: Renewal

   Where conflicting applications have been filed for grazing leases pursuant to section 15 of the Taylor Grazing Act, 43 U.S.C. § 315m (1970), and where both applicants have previously used the land, in the absence of more compelling factors, the land will be awarded to one seeking a renewal of an existing lease since stability of that portion of the livestock industry dependent on the public lands is one of the purposes of the Taylor Grazing Act.

2. Grazing Leases: Apportionment of Land -- Grazing Leases: Preference Right Applicants

   In determining the amount of federal range necessary to permit proper use of base lands, consideration must be given to the criteria set forth in 43 CFR 4121.2-1(d)(2), and the comparative size of the adjacent

and the comparative size of the adjacent base lands held by the conflicting preference right applicants is not the determinative factor, so long as the public land is necessary to the proper use of the preference land.

3. Grazing Leases: Apportionment of Land -- Grazing Leases: Preference Right Applicants

A division of lands for leasing purposes between preference right applicants on an equal plane of preference will not be disturbed where the decision is made in accordance with the regulatory criteria and a review of all factors considered indicates that the decision of the District Manager is correct and equitable.

APPEARANCES: Paul T. Keller, Esq., Keller, Reynolds, and Drake, Helena, Montana, for appellant; Philip W. Strope, Esq., Mahan and Stope, Helena, Montana, for appellees.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Edward Grady appeals from the June 13, 1974, decision of the Missoula, Montana, District Office, Bureau of Land Management which rejected his application to lease portions of sections 2, 3, and 10, T. 11 N., R. 6 W., MPM, Montana. Instead, the grazing lease was awarded to Martin J. and Adeline S. Settle, appellees, who had applied for renewal of their existing lease. Both appellant and appellees submitted acceptable applications to lease the land, and both stood on an equal plane of preference, as provided in departmental regulation, 43 CFR 4121.2-1(c)(1).

The decision of the Missoula District Office was predicated on at least three of the criteria set forth in 43 CFR 4121.2-1(d)(2):

> The authorized officer will allocate the use of the public land on the basis of any or all of the following factors: (i) Historical use, (ii) proper range management, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands under application (where access is not presently available), and (vii) other land use requirements.

The Missoula District Office found that the appellees had established a pattern of historical use. Prior to 1963, both appellant and appellees, or their predecessors in interest, grazed cattle in this area in common. In 1963, appellant, appellees, and their predecessors in interest entered into an agreement dividing the grazing area among the parties. Since that time the area presently in conflict has been held under a grazing lease issued to the appellees. While appellant used the conflict area for some time prior to 1963, the area has been used exclusively by the appellees since then.

[1] One of the purposes of the Taylor Grazing Act, 43 U.S.C. § 315 et seq. (1970), is the promotion of stability in that portion of the livestock industry dependent on the federal range. See Victor Powers, 5 IBLA 197, 201 (1972). For that reason the Department has held that divisions of grazing land should be made on the basis of historical use in the absence of more compelling factors. See, e.g., John Ringheim, 10 IBLA 270 (1973). Since stability is the purpose of basing a division of lands on historical use, in the absence of more compelling factors, it follows that where there is a conflict among several range users, each of whom has some history of use of the area, the land in conflict should be awarded to the party who has applied for renewal of an existing lease. That is particularly true in this case since the parties involved agreed to the division of the lands eleven years ago. Therefore, if the division of these lands were to be made solely on the basis of historical use, the area in conflict would be awarded to the appellees.

[2] Appellant argues, however, that there are other, more important factors which militate in favor of awarding the conflict area to him. First, he asserts that the 1963 division of the conflict area was based on ownership of certain contiguous lands by the various parties at that time. Since then, some of the lands owned by the appellees' predecessor in interest have been acquired by appellant, in particular, a group of mining claims. 1/ In essence, appellant argues that he has more land contiguous to the conflict area than he did at the time of the 1963 agreement, and, as a consequence, should receive more land than in the past.

That argument is without merit. In both the majority and dissenting opinions in Lynn Moedl, 10 IBLA 106 (1973), this

1/ We assume that the claims are patented. If they are unpatented the right of the appellant to control grazing thereon would be substantially different.

Board determined that the amount of preference lands contiguous to land to be leased is not a permissible criterion on which a division of grazing land may be made, so long as the public land is necessary to the proper use of the preference land. Robert D. Liudahl, 17 IBLA 135 (1974).

[3] Appellant next attacks, indirectly, the finding of the District Manager that proper range management can best be served by awarding the conflict area to the appellees. The District Manager noted in his decision that the conflict area contained one of the four different pasture areas which are part of a rest rotation program established in cooperation with the Forest Service, Bureau of Land Management and the appellees. The pasture in the conflict area has apparently improved since the inception of the program in 1972. Appellant, however, has offered to construct a new fence enclosing the conflict area which he asserts will eliminate a trespass problem and which would also be consistent with proper range management. The primary problem that would be eliminated is the problem of trespass of other cattle on appellant's grazing areas. Appellant asserts that he has found as many as 55 cattle belonging to others grazing on his range, while only 12 of his have been found grazing on range belonging to others. The trespass problem arises from members of the public leaving several of the present gates open, thus allowing the cattle to move at will. It has not been suggested that appellees are responsible for the trespass. Appellant argues in the alternative that if he is not granted the conflict area, he will fence some mining claims he owns which extend into the conflict area. This he asserts will leave a small peninsula of land north of the mining claims in section 3, and consequently, that peninsular area will become overgrazed. Neither of these arguments is persuasive. First, it would be inequitable to penalize the appellees for trespass caused by others. Second, even if appellant were to fence in his mining claims, most of the conflict area would still be available for grazing, and there is no evidence that overgrazing would occur.

Finally, the District Manager found that appellees have a greater need for the land since they are grazing more cattle on a smaller amount of land. While appellant would like to acquire more cattle, he has not demonstrated as great a present need as have the appellees.

In sum, the decision of the District Manager is correct on every point. A decision of a District Manager, made in accordance with the regulatory criteria, will be allowed to stand in the absence of a showing that the decision is arbitrary, capricious or inequitable. Claudio Ramirez, 14 IBLA 125 (1973); Lynn Moedl, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Anne Poindexter Lewis
Administrative Judge